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No. 94, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF SOUTH CAROLINA, PLAINTIFF

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE COMPLAINT

MOTION OF DEFENDANT FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

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Pursuant to Rules 9.5 and 9.6 of the Rules of the Court, the Solicitor General, on behalf of the Secretary of the Treasury, moves for leave to file the annexed supplemental memorandum.

In response to South Carolina's Motion for Leave to File an Original Complaint, we primarily invoked the Anti-Injunction Act, 26 U.S.C. (Supp. V) 7421(a), and the Declaratory Judgment Act, 28 U.S.C. (Supp. V) 2201, as barring the proposed suit. See Br. in Opp. 4-11. In its Reply Brief (at 3), the State apparently agrees that the cited statutes would preclude "this action in any lower court," but argues that, because "South Carolina has no forum in which to contest the constitutionality of the challenged provision" (*ibid.*), this Court should hear the case. The major premise of this plea is that the Anti-Injunction Act and the Declaratory Judgment Act must be deemed inapplicable to any original suit in this Court, since "Congress may neither enlarge nor diminish

the original jurisdiction of the United States Supreme Court" (*id.* at 1).

We have had no occasion to respond to that argument. Yet, it may be the focal issue for consideration by the Court at the forthcoming oral argument on the Motion for Leave to File. In these circumstances, it seems appropriate now to submit a short written statement on this point and we accordingly seek leave to do so.*

Granting this motion will not require postponing the date of oral argument. Even the plaintiff deemed it necessary to reply, the case could be heard at the October session. We fully appreciate South Carolina's concern that the Court determine as soon as convenient whether it will entertain the tendered Complaint and we have no wish to delay that decision. We believe that a written submission now may aid the Court in reaching an earlier resolution of the jurisdictional issue.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1983

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* Shortly after the Court set down for oral argument the Motion for Leave to file an Original Complaint, the parties were advised by the Clerk that no further briefs could be submitted except upon special leave granted by the Court. The State of South Carolina, as plaintiff, has not sought to supplement its earlier submission, and, on behalf of the defendant, we have accordingly deemed it inappropriate to ask permission to submit fuller argument on the merits, confining the attached memorandum to a jurisdictional issue previously not addressed. On the other hand, we recognize that the Court is free to reject the plaintiff's claim on the merits without granting leave to file the Complaint. See *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973); *California* v. *Washington*, 358 U.S. 64 (1958); *Alabama* v. *Texas*, 347 U.S. 272 (1954). We urge that result here if the Court concludes that no jurisdictional barrier stands in the way. Should the Court wish further briefing on the merits with a view to considering such a disposition, we, of course, stand ready to make an additional submission.

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SUPPLEMENTAL MEMORANDUM FOR THE DEFENDANT

The present memorandum is addressed to a single question: Whether the statutes barring any federal court from entertaining an injunctive or declaratory action inhibiting the assessment or collection of federal taxes should govern, or guide, this Court in the exercise of its original jurisdiction.

1. For present purposes, we assume: (1) that South Carolina has asserted a sufficient interest of its own to have constitutional standing to bring the proposed suit in the name of the State; (2) that, given that only prospective relief is sought against an official's enforcement of a statute alleged to violate the Constitution, sovereign immunity does not bar the action; and (3) that the case is otherwise within this Court's original jurisdiction.[1]

[1] The federal judicial power extends to this suit on two independent grounds: it is a "case[] in * * * Equity, arising under

So, also, it is common ground that, except for the Anti-Injunction Act (26 U.S.C. (Supp. V) 7421(a)) and the Declaratory Judgment Act (28 U.S.C. (Supp. V) 2201), the appropriate district court would have concurrent jurisdiction with this Court to entertain the suit, since Congress has preserved exclusive original jurisdiction in this Court only for "controversies between two or more States." 28 U.S.C. (Supp. V) 1251(a). Finally, as we have already sufficiently argued (Br. in Opp. 4-11) and as South Carolina apparently concedes (Reply Br. 1-5), we begin with the premise that, in any other federal court, this action would be barred by the Anti-Injunction Act and the Declaratory Judgment Act.[2]

On these assumptions, the only remaining issue at this stage is whether, as a matter of law or of judicial discretion, the Court should invoke the Acts of Congress just cited to deny leave to file the Complaint. In our view, the Anti-Injunction Act and the Declaratory Judgment Act are fully applicable to this Court, as their lan-

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[the] Constitution" (the Tenth Amendment), as well as a "controvers[y] * * * between a State and [a] Citizen[] of another State." Art. III, § 2, cl. 1. This Court's original jurisdiction attaches because the case is one "in which a State [is a] party." Art. III, § 2, cl. 2.

[2] We note that South Carolina, correctly, does not invoke as an exception to the bar against declaratory actions, a provision enacted in 1978, 26 U.S.C. (Supp. V) 7478. That provision only permits a suit in the Tax Court for "a declaration whether * * * prospective obligations are described in section 103(a)"—which, in turn exempts from federal income taxation interest on general State and municipal bonds (26 U.S.C. 103(a)). Section 7478 is obviously inapplicable here since Section 103(a) has effectively been amended by the Tax Equity and Fiscal Responsibility Act of 1982 to make clear that most State and municipal bonds issued in bearer form are no longer embraced by Section 103(a). See Section 103(j), added by Section 310(b)(1) of the 1982 Tax Act (96 Stat. 596). Br. in Opp. App. 4a. There is no issue of statutory construction presented here and it seems clear that Section 7478 is confined to matters of coverage and was not intended to permit the constitutional challenge now mounted by South Carolina.

guage plainly suggests.[3] But, alternatively, we submit that the Court may, and should, look to those statutes in determining whether, as a matter of judicial discretion, it will exercise its original jurisdiction and, accordingly, should refuse to entertain this action.

2. We do not here question the several *dicta* in decisions of this Court to the effect that Congress cannot take away the original jurisdiction conferred on the Court by the Constitution itself—albeit other courts may be given concurrent power to exercise the same jurisdiction. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332 (1816); *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 86 (1861); *Bors* v. *Preston*, 111 U.S. 252, 261 (1884); *Ames* v. *Kansas*, 111 U.S. 449, 464 (1884); *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 300 (1888); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895); *California* v. *Arizona*, 440 U.S. 59, 65-66 (1979). See, also, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 357 n.1 (1966) (Black, J., dissenting in part). But it hardly follows that every remedial or procedural rule enacted by Congress is inapplicable to original proceedings in this Court, even if the end result is to bar the suit.

It is clear, of course, that Congress' refusal "to waive the Nation's sovereign immunity" "binds[s] this Court even in the exercise of its original jurisdiction." *California* v. *Arizona*, *supra*, 440 U.S. at 65. We do not suppose anyone would assert that uniform conditions attaching to such a waiver are inapplicable when the suit is filed here.[4] It would be strange, indeed, if a State plain-

[3] The Anti-Injunction Act in terms embraces "any court" (26 U.S.C. (Supp. V) 7421(a)); the Declaratory Judgment Act on its face likewise runs to "any court of the United States" (28 U.S.C. (Supp. V) 2201), which, of course, includes this Court (28 U.S.C. (Supp. V) 451).

[4] In *California* v. *Arizona*, *supra*, the Court expressed serious doubt whether a waiver of sovereign immunity could exclude this Court. We do not fully understand how granting exclusive juris-

tiff, suing under the Tucker Act or the Quiet Title Act, could, by successfully invoking this Court's original jurisdiction, avoid the limitations provisions applicable to it in the lower courts. See *United States* v. *Louisiana*, 127 U.S. 182, 185, 192 (1888); *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983). Nor do we appreciate why the result should not be the same, in cases of concurrent jurisdiction, where the time bar is not imposed as a condition of lifting sovereign immunity. See *Block* v. *North Dakota*, *supra*, slip op. 13-18.

The same principle, it seems to us, applies to other procedural barriers uniformly imposed on plaintiffs in the federal courts, whether the rule proscribes filing too soon rather than too late, or limits available remedies. After all, the original jurisdiction of this Court exists primarily to afford the States a forum appropriate to their sovereign status; but, to serve that end, the door need be no wider than it would be in other federal courts.[5] If, as is

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diction to a district court (or any other tribunal) over actions that previously were barred by sovereign immunity in *all* federal courts can be said to "withdraw" (440 U.S. at 65) or "limit" (*id.* at 66) this Court's original jurisdiction. Indeed, the opinion in *United States* v. *Louisiana*, 123 U.S. 32, 36-37 (1887) can be read as indicating that, with respect to actions otherwise barred by sovereign immunity, Congress may confine a State plaintiff to a lower court without violating Article III. See, also *State of Louisiana* v. *United States*, 22 Ct. Cl. 85, 91 (1887). The Court may wish to reconsider the broad dictum of *California* v. *Arizona* (insofar as it goes beyond the Quiet Title Act) before States with claims under the Tucker Act or the Tort Claims Act, or the Internal Revenue Code, are emboldened to invoke this Court's original jurisdiction, notwithstanding provisions of the Judicial Code apparently restricting such suits to lower courts. See 28 U.S.C. (& Supp. V) 1346(a)(1), 1346(a)(2), 1346(b), 1491; 26 U.S.C. (& Supp. V) 6213(a), 7422. But, however that may be, nothing in *California* v. *Arizona* suggests that different remedial or procedural rules apply to a suit filed here instead of a lower court with concurrent jurisdiction.

[5] We except, of course, those rare categories of cases within the federal judicial power and the original jurisdiction of this Court which Congress has withheld from the lower federal courts, either by declaring this Court's jurisdiction exclusive (controversies between two States, see 28 U.S.C. (Supp. V) 1251(a)), or simply by failing to vest jurisdiction in any other court (*e.g.*, State law claims

well settled, a State is not excused from procedural requirements when it sues in the lower courts (*e.g.*, *Block* v. *North Dakota*, *supra*), there is no obvious reason why like restrictions should not be applicable when it invokes the original jurisdiction of this Court.

It is familiar history that this Court has repeatedly declined to hear cases concededly within its original jurisdiction, effectively erecting a threshold requirement that the controversy be of sufficient "magnitude." *E.g.*, *Arizona* v. *New Mexico*, 425 U.S. 794, 796-797 (1976); *United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 501 (1971); *Massachusetts* v. *Missouri*, 308 U.S. 1, 19-20 (1939). See generally *New York* v. *New Jersey*, 256 U.S. 296, 299, 309 (1921). So, also, the Court's Rules adopt, albeit as a "guide," the Federal Rules of Civil Procedure to govern original actions (Rule 9.2), and the Court has applied the principle of those Rules in determining whether the suit may proceed for lack of an indispensable party (*e.g.*, *Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380 (1980)) and in resolving motions to intervene (*e.g.*, *Arizona* v. *California*, No. 8, Original (Mar. 30, 1983)), slip op. 8. We take it for granted that in deciding whether to exercise original jurisdiction, the Court may likewise invoke non-constitutional prudential doctrines, whether standing or ripeness or prospective mootness or comity or finality, and, accordingly, may decline to intervene prematurely. See, *e.g.*, *California* v. *Texas*, 457 U.S. 164, 168-169 (1982).

To be sure, it may be answered that, while the Court itself is free to fashion restraints on the exercise of its original jurisdiction, the Congress is not. But that is a

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asserted by a State against citizens of another State or aliens, see *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971)). But this is no such case, since the claim is one "arising under the Constitution," in principle within the jurisdiction of the district courts (28 U.S.C. (Supp. V) 1331), and one as to which this Court's original jurisdiction is not exclusive (28 U.S.C. (Supp. V) 1251(b)(3)).

questionable proposition. The Court, no more than Congress, can amend the Constitution by depriving States of access to a jurisdiction there conferred for their benefit. The explanation of this Court's discretionary actions therefore must be that Article III does not preclude procedural rules which sometimes effectively close the door to a State plaintiff. And, if this is so, it is not apparent why, within like boundaries, Congress cannot fashion those rules.

Presumably, neither the Congress nor the Court can, in the name of procedure, eliminate an entire category of jurisdiction which the Constitution vests in this Court. Thus, we may assume that it would be impermissible to promulgate a rule barring all original suits challenging the constitutionality of Acts of Congress, or even only tax statutes. But there is nothing in Article III that forbids specifying how and when such a challenge shall be entertained. The Anti-Injunction Act and the Declaratory Judgment Act do no more than postpone a constitutional attack against revenue measures. Indeed, for at least a century, the rule against enjoining the collection of federal taxes has been justified in this Court on the ground that the availability of a refund suit provides an adequate remedy. *Snyder* v. *Marks*, 109 U.S. 189, 193-194 (1883); *Bob Jones University* v. *Simon*, 416 U.S. 725, 746-748 (1974). See generally P. Bator, P. Mishkin & D. Shapiro, *Hart and Wechsler's, The Federal Courts and the Federal System* 332-335 (2d ed. 1973). The result is not a withdrawal of subject-matter jurisdiction, but merely a limitation of remedies and a restriction on timing.

Neither the Anti-Injunction Act nor the Declaratory Judgment Act prevents a State, as taxpayer, from invoking the original jurisdiction of this Court, after assessment or payment, to contest any federal tax as an unconstitutional exaction.[6] If, in the present context, no

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[6] This is not to say that, so far as a refund suit is permissible only by virtue of a waiver of sovereign immunity, Congress cannot restrictively lift the bar and open only lower courts to such suits. See note 4, *supra*.

original suit will lie, it is only because South Carolina is not the taxpayer and will not be the proper party to challenge the assessment or claim a refund, and the bond interest recipient cannot invoke this Court's original jurisdiction. But that is a fortuitous result, in no way directly attributable to the statutes we now invoke. And, of course, the constitutionality of Section 310 of the Tax Equity and Fiscal Responsibility Act of 1982 (96 Stat. 595) can be litigated elsewhere in due course. See Br. in Opp. 6 and note 7, *infra*.[7]

In sum, we submit the bar of the Anti-Injunction Act and its counterpart in the Declaratory Judgment Act are properly viewed as announcing a procedural rule that does not discriminate against this Court's original jurisdiction and does not impermissibly narrow the constitutional grant of Article III. We do not suppose that, by invoking this Court's original jurisdiction, a State can avoid the barrier of the Norris-LaGuardia Act (29 U.S.C. 52) and Congress' grant of primary jurisdiction to the National Labor Relations Board to obtain a labor injunction, or overcome the limitations announced in Section 2283 of the Judicial Code to enjoin judicial proceedings that may adversely affect the State or its citizens.[8]

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[7] We note that the issue on the merits will not be mooted by general State acceptance of the incentive in favor of registration of bonds given by the 1972 Tax Act. South Carolina has indicated its intention to continue issuing bearer bonds. Complaint, para. 8, at Motion 6-7; Motion 13-14, 35-37. Other States may do likewise, at least until the validity of the 1972 Tax Act is settled. Nor need South Carolina stand aside while the issue is litigated in a taxpayer suit. Nothing prevents South Carolina or any other affected State from actively supporting the taxpayer plaintiff in a test case in the Tax Court or a refund suit in the district court or the Claims Court.

[8] These scenarios may seem far-fetched, but recent experience teaches that this Court's original jurisdiction is likely to be invoked in once unexpected contexts. See, *e.g.*, *California* v. *West Virginia*, 454 U.S. 1027 (1981) (football contract); *California* v. *Texas*, 454 U.S. 886 (1981) (the medfly); *Idaho* v. *Vance*, 434 U.S. 1031 (1978) (Panama Canal Treaty); *Alabama* v. *Connally*, 404 U.S. 933 (1971) (religious tax exemptions); *Massachusetts* v. *Laird*, 400 U.S. 886 (1970) (the Vietnam War); *Alabama* v. *Finch*,

The same approach should be followed here.[9]

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396 U.S. 552 (1970) (school desegregation enforcement). It is not difficult to imagine situations in which a State might wish to apply to this Court when other federal courts are barred from granting relief and its own courts are unable or unwilling to do so.

Thus, in the case of a labor dispute, State tribunals may be inhibited by State law or federal pre-emption from issuing an injunction, the State government or one of its institutions may be the employer or otherwise directly affected by the dispute, and its claim may rest on federal law or the prospective defendants may be citizens of another State, thereby bringing the controversy within this Court's original jurisdiction. (We assume, notwithstanding the failure of the Judicial Code to so provide (28 U.S.C. (Supp. V) 1251) and contrary indications in some of the Court's opinions (*e.g., California* v. *Southern Pacific Co.*, 157 U.S. 229, 261-262 (1895); *New Mexico* v. *Lane*, 243 U.S. 52, 58 (1917); *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 163 (1922)), that this Court enjoys concurrent original jurisdiction of *all* cases within the federal judicial power, not barred by sovereign immunity, where a State is a party, including a suit founded on federal law by a State against its own citizens. See *United States* v. *Texas*, 143 U.S. 621, 642-645 (1892); *Monaco* v. *Mississippi*, 292 U.S. 313, 321, 329-330 (1934)).

So, also, a State, made defendant in another State's court (see *Nevada* v. *Hall*, 440 U.S. 410 (1979)), might well ask this Court to enjoin those proceedings in favor of an original suit here. Or the State may wish to abort a private lawsuit in its own courts implicating its sovereign interests with a view to proceeding by an original action in this Court in the name of the State (assuming its claim is against citizens of another State or is founded on federal law).

To be sure, the Court could rebuff all such attempts even without invoking the Norris-LaGuardia Act or Section 2283. But if these barriers are operative of their own force, the Court will be spared the case-by-case screening otherwise required in disposing of motions for leave to file original complaints.

[9] Like the Anti-Injunction Act and the Declaratory Judgment Act (see note 3, *supra*), the Norris-LaGuardia Act expressly runs to "any court of the United States" (29 U.S.C. 52), and Section 2283 of the Judicial Code is presumably likewise addressed to all federal courts ("A court of the United States may not * * *"). This is, of course, to be contrasted with the Tax Injunction Act (28 U.S.C. 1341) and the Johnson Act (28 U.S.C. 1342) which only inhibit "[t]he district courts" from premature interference with the collection of State taxes or the implementation of State rate orders. By

3. We have argued that the statutory restraint on premature interference with federal tax collection embodied in the Anti-Injunction Act and the Declaratory Judgment Act is fully applicable to the exercise of this Court's original jurisdiction without offending Article III. Our reasoning has been that Congress, equally with the Court itself, is constitutionally free to promulgate binding procedural rules that regulate, without destroying, the exercise of that jurisdiction. But the Court may deem it unnecessary to reach that question, preferring to rest on its discretion.

As we have said, the Court has always deemed itself authorized to decline to hear a particular case within its original jurisdiction if prudential considerations counseled self-restraint. Surely, the Court is entitled to take into account long-standing congressional policy reflected in procedural statutes in reaching its decision whether to exercise this unusual jurisdiction. Indeed, we would expect the Court to give great deference to a legislative directive against premature judicial interference. Quite aside from the sound reasons underlying the Anti-Injunction Act and its corollary in the Declaratory Judgment Act, it would be anomalous for this Court, necessarily more sparing in the exercise of original jurisdiction, to become the haven for suits that cannot be entertained in lower courts with concurrent jurisdiction.[10]

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their very terms, the latter provisions do not control the exercise of this Court's original jurisdiction. See *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981). But see pages 9-10, *infra*.

[10] South Carolina taxes us with inconsistency in arguing, on the one hand, that the Anti-Injunction Act and the Declaratory Judgment Act bar the present suit in any court, and then suggesting, on the other hand, that the case be remitted to a district court. Reply Br. 3-4. This is disingenuous. Our plea for denial of leave to file here in favor of a district court forum was plainly stated as an alternative argument, in the event the Court should hold, contrary to our primary contention, that the statutes invoked do not bar the suit. Br. in Opp. 11-12. To the extent that South Carolina concedes that the Anti-Injunction Act and the Declaratory Judg-

Thus, we submit the Court can and should follow the rule of the Anti-Injunction Act as a matter of discretion, even if not strictly bound to do so.

For the reasons stated here and in our Brief in Opposition, the Court should deny leave to file the tendered Original Complaint.

Respectfully submitted.

REX E. LEE
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AUGUST 1983

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ment Act preclude the action, as now framed, in any lower court, our alternative submission is moot. What we *do* continue to assert is that this Court should decline jurisdiction in favor of a taxpayer suit, after assessment or payment, in the Tax Court, the district court, or the Claims Court. See 26 U.S.C. (& Supp. V) 6213(a), 7422; 28 U.S.C. (& Supp. V) 1346(a)(1), 1491.

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